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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

10 PHILIP EUGENE LOWER,)
11 #63837)
12 Plaintiff,) 3:10-cv-00450-ECR-RAM
13 vs.)
14 MIKE HALEY, *et al.*,)
15 Defendants.)
16 _____/

ORDER

17 This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. The court now
18 reviews the complaint.

19 **I. Screening Standard**

20 Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a
21 prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious,"
22 "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who
23 is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an
24 arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may,
25 therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or
26 where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a

1 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*
 2 *v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

3 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 4 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under
 5 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under
 6 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,
 7 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the
 8 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief
 9 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965
 10 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a
 11 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,
 12 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*
 13 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to
 14 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

15 Allegations in a *pro se* complaint are held to less stringent standards than formal
 16 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S.
 17 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
 18 Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the
 19 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal
 20 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of
 21 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual
 22 allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever*
 23 *v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

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1 To sustain an action under section 1983, a plaintiff must show (1) that the conduct
2 complained of was committed by a person acting under color of state law; and (2) that the conduct
3 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676,
4 689 (9th Cir. 2006).

5 **II. Instant Complaint**

6 Plaintiff, who is incarcerated at Northern Nevada Correctional Center (“NNCC”), has
7 sued the State of Nevada as well as Washoe County Sheriff Mike Haley and Washoe County deputy
8 sheriffs Does 1-4. Plaintiff claims that Sheriff Haley knowingly and willingly caused and/or allowed
9 his deputy sheriffs to use excessive force against plaintiff in violation of his Eighth and Fourteenth
10 Amendment rights. Plaintiff alleges the following: on April 2, 2010, he was in the custody of the
11 Washoe County Detention Center being prepared for transport to Nevada State Prison. Deputy sheriffs
12 lined up thirteen inmates in the hallway and ordered them to face the wall. Upon hearing screaming,
13 plaintiff turned his head to look and Doe deputy sheriffs used excessive force to restrain him, including
14 banging his head against the wall and then cement floor, breaking his right hand, kneeling on his lower
15 back and neck, kicking him in the head and neck, and dragging him by his handcuffed wrists and
16 shackled feet to a holding cell. Plaintiff suffered multiple injuries.

17 First, while plaintiff names the state of Nevada as a defendant, states and any
18 governmental agency that is an arm of the state are not persons for purposes of § 1983. *See Arizonans*
19 *for Official English v. Arizona*, 520 U.S. 43, 69 (1997); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58,
20 71 (1989); *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Hale v. Arizona*,
21 993 F.2d 1387, 1398-99 (9th Cir. 1993) (en banc); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320,
22 1327 (9th Cir. 1991); *Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Flint v. Dennison*, 488 F.3d 816, 824-
23 25 (9th Cir. 2007). Section 1983 claims against states or a governmental entity that is an arm of the state,
24 therefore, are legally frivolous. *See Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989), superseded
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1 by statute on other grounds as stated in *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (*en banc*).
 2 Accordingly, the claims against the state of Nevada are dismissed with prejudice, and the state of
 3 Nevada is dismissed from this action.

4 Next, the court notes that, “[w]here a particular amendment ‘provides an explicit textual
 5 source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment,
 6 not the more generalized notion of “substantive due process,” must be the guide for analyzing [a
 7 plaintiff’s] claims.’” *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994) (Rehnquist, C.J., for plurality)
 8 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Therefore, plaintiff’s claims will be analyzed
 9 under the Eighth Amendment right to be free from cruel and unusual punishment rather any generalized
 10 notions of substantive due process under the Fourteenth Amendment, and his Fourteenth Amendment
 11 claim must be dismissed.

12 Turning to plaintiff’s Eighth Amendment claims, that amendment prohibits the
 13 imposition of cruel and unusual punishments and “embodies broad and idealistic concepts of dignity,
 14 civilized standards, humanity and decency.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). “[W]henever
 15 prison officials stand accused of using excessive physical force in violation of the [Eighth Amendment],
 16 the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore
 17 discipline, or maliciously and sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992);
 18 *see also Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); *Watts v. McKinney*, 394 F.3d 710, 711 (9th Cir.
 19 2005); *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003); *Marquez v. Gutierrez*, 322 F.3d 689,
 20 691-92 (9th Cir. 2003); *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002); *Jeffers v. Gomez*, 267 F.3d
 21 895, 900 (9th Cir. 2001) (*per curiam*); *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000); *Robins
 22 v. Meecham*, 60 F.3d 1436, 1441 (9th Cir. 1995); *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986).
 23 When determining whether the force is excessive, the court should look to the “extent of injury . . . , the
 24 need for application of force, the relationship between that need and the amount of force used, the threat
 25 ‘reasonably perceived by the responsible officials,’ and ‘any efforts made to temper the severity of a
 26 forceful response.’” *Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321); *see also Martinez*, 323

1 F.3d at 1184. Although the Supreme Court has never required a showing that an emergency situation
 2 existed, “the absence of an emergency may be probative of whether the force was indeed inflicted
 3 maliciously or sadistically.” *Jordan*, 986 F.2d at 1528 n.7; *see also Jeffers*, 267 F.3d at 913 (deliberate
 4 indifference standard applies where there is no “ongoing prison security measure”); *Johnson v. Lewis*,
 5 217 F.3d 726, 734 (9th Cir. 2000). Moreover, there is no need for a showing of serious injury as a result
 6 of the force, but the lack of such injury is relevant to the inquiry. *See Hudson*, 503 U.S. at 7-9; *Martinez*,
 7 323 F.3d at 1184; *Schwenk*, 204 F.3d at 1196. Plaintiff states Eighth Amendment claims for excessive
 8 force against the remaining defendants.

9 **III. Conclusion**

10 **IT IS THEREFORE ORDERED** that the Clerk of the Court shall **FILE** the complaint
 11 (docket #1-1, Exhibit B).

12 **IT IS FURTHER ORDERED** that the claims against the State of Nevada are
 13 **DISMISSED**. The State of Nevada is **DISMISSED** from this action.

14 **IT IS FURTHER ORDERED** that plaintiff’s Fourteenth Amendment claim is
 15 **DISMISSED** with prejudice and without leave to amend.

16 **IT IS FURTHER ORDERED** that plaintiff’s Eighth Amendment claims **MAY**
 17 **PROCEED**.

18 **IT IS FURTHER ORDERED** that defendant(s) shall file and serve an answer or other
 19 response to the complaint within **thirty (30) days** following the date of the early inmate mediation. If
 20 the court declines to mediate this case, an answer or other response shall be due within **thirty (30) days**
 21 following the order declining mediation.

22 **IT IS FURTHER ORDERED** that the parties **SHALL DETACH, COMPLETE, AND**
 23 **FILE** the attached Notice of Intent to Proceed with Mediation form on or before **thirty (30) days** from
 24 the date of entry of this order.

25 **IT IS FURTHER ORDERED** that defendants’ motion to dismiss (docket #2) is
 26 **DENIED** without prejudice as premature.

1 **IT IS FURTHER ORDERED** that plaintiff's motion for emergency discovery (docket
2 #5) is **DENIED** without prejudice.

3 **IT IS FURTHER ORDERED** that plaintiff's motion for enlargement of time (docket
4 #6) is **DENIED**.

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7 DATED this 4th day of November, 2010.

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10 UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. _____

**NOTICE OF INTENT TO
PROCEED WITH MEDIATION**

This case may be referred to the District of Nevada's early inmate mediation program. The purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by which the parties meet with an impartial court-appointed mediator in an effort to bring about an expedient resolution that is satisfactory to all parties.

1. Do you wish to proceed to early mediation in this case? _____ Yes _____ No
2. If no, please state the reason(s) you do not wish to proceed with mediation?

3. List any and all cases, including the case number, that plaintiff has filed in federal or state court in the last five years and the nature of each case. (Attach additional pages if needed).

1 4. List any and all cases, including the case number, that are currently pending or any pending grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

6 5. Are there any other comments you would like to express to the court about whether this case is
7 suitable for mediation. You may include a brief statement as to why you believe this case is
suitable for mediation. (Attach additional pages if needed).

11 This form shall be filed with the Clerk of the Court on or before thirty (30) days from the
12 date of this order.

13 Counsel for defendants: By signing this form you are certifying to the court that you have
14 consulted with a representative of the Nevada Department of Corrections concerning participation in
 mediation.

Signature

Name of person who prepared or helped prepare this document